



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: DEL Manufacturing Company

File: B-231736

Date: October 18, 1988

DIGEST

Protest against procuring agency's decision to issue solicitation as a small business set-aside without a small disadvantaged business (SDB) 10 percent evaluation preference, is denied where the solicitation was based on a deviation from the requirement in Department of Defense Federal Acquisition Regulation Supplement § 19.502-72(a) to issue the procurement as a SDB set-aside.

DECISION

DEL Manufacturing Company protests the United States Army Armament, Munitions and Chemical Command's (AMCCOM), decision to issue request for proposals (RFP) No. DAA9-87-R-0931, for 209,280 BDU-33 practice bombs, as a total small business set-aside, instead of a total small disadvantaged business (SDB) set-aside. DEL contends that Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 19.502-72(a) (DAC 86-15) required AMCCOM to set the procurement aside exclusively for SDBs.

We deny the protest.

The procurement originally was part of an AMCCOM requirement for 1,274,000 BDU-33 practice bombs that was synopsisized in the Commerce Business Daily on September 10, 1987, as a total SDB set-aside. Since the BDU-33 practice bomb is an industrial mobilization base item, AMCCOM previously had procured the item under the Department of Defense (DOD) Industrial Preparedness Program, not set aside for small business, pursuant to the industrial mobilization base exception to full and open competition found at 10 U.S.C. § 2304(c)(3) (Supp. IV 1986). However, section 1207 of the National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3816, established a goal for the DOD of awarding to SDBs 5 percent of the dollar value of total contracts awarded for the fiscal year. Moreover,

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DFARS § 19.502-72(a), implementing the act, required a total SDB set-aside where there was a reasonable expectation that offers would be received from at least two responsible SDB concerns and that the award would be made at a price not exceeding the fair market price by more than 10 percent. Two of the industrial mobilization producers--Abbott Products, Incorporated and DEL--were SDBs, and had offered competitive prices under prior BDU-33 procurements. Therefore, AMCCOM synopsized the requirement as a total SDB set-aside.

Following this publication of the procurement as a SDB set-aside, several members of Congress wrote letters to the Secretary of Defense, on behalf of David B. Lilly Company, Inc. (Lilly), the incumbent small business industrial mobilization base producer of the item. Lilly had advised that precluding it from competing on contracts for the supply of the BDU-33 practice bomb would shut down its company. These letters generally questioned whether Pub. L. No. 99-661, § 1207, was intended to increase SDB participation at the expense of small businesses.

Responding to the congressional inquiry, in late December 1987, the Director of Contracting, Office of the Assistant Secretary, directed AMCCOM to suspend the issued solicitation pending review of the impact to Lilly were it excluded from competing for the requirement. Further, the Director instructed AMCCOM to reconcile Pub. L. No. 99-661, § 1207, with the National Defense Authorization Act for fiscal years 1988 and 1989, Pub. L. No. 100-180, §§ 806(a) and 806(b)(7), 101 Stat. 1019 (1987). The latter act, which was passed in early December, requires that to the maximum extent practicable, DOD maintain current levels in number and dollar value of contracts awarded under the other two set-aside programs for small businesses, in addition to providing new opportunities for SDBs under the program. Current DOD regulations provide that a total SDB set-aside shall not be conducted when the product has been previously acquired successfully through one of the other two set-aside programs for small businesses. See DFARS § 19.502-72(b).

The impact analysis on Lilly was completed in February 1988 and revealed that sales for the BDU-33 practice bomb, over Lilly's Delfasco Division's 2-year incumbency, accounted for 99 percent (fiscal year 1985), 93 percent (fiscal year 1986), and 95 percent (fiscal year 1987) of the Delfasco Division's business. Of the Lilly company's overall business, the BDU-33 sales accounted for 60.9 percent (fiscal year 1985), 71 percent (fiscal year 1986), and 77 percent (fiscal year 1987).

Based on this data, AMCCOM requested an individual deviation from DFARS § 19.502-7(a). Section 1.403 of the Federal Acquisition Regulation (FAR) and DFARS § 1.403 permit the procuring agency to deviate from the specific regulatory requirements of the FAR, DFARS, or a Department of Defense Directive on a one contract or procurement basis. The deviation was requested to allow Lilly, as well as the two SDBs, to compete for the contract under a total small business set-aside pursuant to FAR § 19.502-2 (FAC 84-37) with a stipulation requiring a 10 percent evaluation preference for SDBs pursuant to DFARS § 19.7000(a). The deviation was approved on March 31, 1988.

In the interim, between AMCCOM's decision to evaluate the impact on Lilly and the deviation, the Department of the Air Force's inventory of the BDU-33 practice bomb became critically low and on February 24 the Air Force advised AMCCOM that further delay in procurement of the practice bombs for fiscal year 1988 would result in serious deterioration in the Air Force's pilot proficiency training program. Further, the Air Force advised that by September 1988 it would be unable to support its pilot proficiency program unless award was made to a competent producer capable of manufacturing at a rate of 90,000 bombs per month by that time. Therefore, on February 25, AMCCOM issued a sole-source solicitation to Lilly. AMCCOM awarded a contract to Lilly on March 30.^{1/} Although the Air Force's fiscal year 1988 requirement for BDU-33 practice bombs was initially listed in the synopsis as 1,274,000, that quantity was later reduced to 810,320. The sole-source award to Lilly accounted for 601,040 of the 810,320 requirement. On May 5, 1988, AMCCOM issued the RFP protested here without a preference for SDBs because current DOD regulations provide that SDB preferences do not apply to small business set-asides. See DFARS § 19.7000(a) (DAC 86-15).

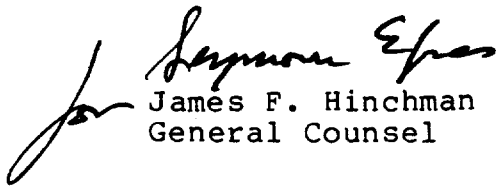
While DEL argues that the solicitation should have been issued as a set-aside for SDBs under the DFARS, this ignores the fact that AMCCOM, in accordance with DFARS § 1.403, obtained a proper deviation from the regulations. Therefore, AMCCOM's issuance of the solicitation as a small business set-aside is not legally objectionable.

Finally, DEL contends that if the solicitation could be issued as a small business set-aside, it should also contain the 10 percent evaluation preference for SDBs, as noted in

^{1/} Our Office upheld AMCCOM's decision to sole source part of its requirements to Lilly in Abbott Products, Inc., B-231131, Aug. 8, 1988, 88-2 CPD ¶ ____.

the deviation. However, this preference was to be included in the solicitation by the force of the then current regulation, not by the terms of the deviation. As noted earlier, the regulation was changed, effective for all pending solicitations with a bid opening of June 6, 1988 or later, to prohibit the evaluation preference from being included in small business set-asides. See 53 Fed. Reg. 20630 (1988) (to be codified at 48 C.F.R. § 219.7000). The bid opening here was originally scheduled for June 20, 1988, and, therefore, the evaluation preference properly was not included.

The protest is denied.


James F. Hinchman
General Counsel